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IN THE

SUPREME COURT OF THE UNITED STATES

No. 630

ALLEN M. WILLIAMS, also known as Clyde Walter Huntsworth and Fred Westley Anderson,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. _____

RICHARD CHARLES MEIER, also known as George E. Richmond,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, Allen M. Williams and Richard Charles Meier, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cases on September 30, 1963.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of September 30, 1963, is not reported but is set forth in Appendix A, *infra*, pages A1-A9.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on September 30, 1963, and is set forth in Appendix B, *infra*, pages A10-A11.

A timely Petition for Rehearing was filed on October 10, 1963, was denied on October 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Rule 22(2), Rules of the Supreme Court and Rule 37(b) of the Federal Rules of Criminal Procedure and Rule 41(e) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Were the defendants arrested without probable cause.

2. Were the defendants illegally restrained of their liberties.

3. Were the defendants illegally arrested without a warrant.

4. Were the defendants illegally restrained of their rights of counsel.

5. Did the District Court illegally overrule the Motion to Suppress Evidence of defendants.

6. Was the evidence against defendants illegally obtained.

7. Were the rights of defendants properly protected, as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States of America.

8. Were the rights of defendants protected, as guaranteed by the Constitution of the State of Wyoming.

9. Can defendants be held on any trumped-up charge just to keep them in custody while they are being investigated.

10. Must a Motion to Suppress Evidence be raised continuously throughout the trial, once the Court has ruled on it.

11. Is the misconduct of the United States Attorney, in making mis-statements and prejudicial statements to the jury, cured by primary objections and by the Court advising the jury to disregard the statements after the ears of the jury have once heard the prejudicial statements.

12. Must defense counsel qualify the State's witnesses when an objection is raised as to qualifications, as directed by the trial judge.

13. Are the rights of defendants adequately protected when repetitious misconduct of the prosecuting attorney is present and where improper evidence has been let in, even though any one particular misconduct or improper evidence would not be prejudicial but the summation and the sum total of the same would be highly prejudicial.

STATUTES INVOLVED

The statutory provisions involved are, Title 18, U.S.C., Section 2312. Said section is printed in Appendix C, *infra*, page A12.

STATEMENT

Appellants as co-defendants, Allen M. Williams and Richard Charles Meier, hereinafter referred to as Williams and Meier, were charged in separate counts by Information, having waived a Grand Jury indictment, of the charge of violation of Title 18, U.S.C., §2312 (interstate transportation of stolen motor vehicle), that they did unlawfully and willfully transport, cause to be transported, and did aid and assist in transporting in interstate commerce a stolen 1961 Cadillac Tudor Sedan, white in color, vehicle identification number 61G-128725, engine number 16X-128935, bearing 1962 Nebraska license 2-53985, the property of J. C. Lunsford, Portland, Oregon, from Portland, Oregon to Laramie, Wyoming, knowing the same to have been stolen.

For the purpose of convenience, reference to the Transcript of the Record is referred to as (R.). Reference to the Petition for Rehearing is referred to as (PR.).

Williams and Meier were tried together before a jury on November 14, 1962, and were convicted of the count in said indictment. On December 7, 1962, Williams was sentenced to imprisonment for a period of four (4) years and Meier was sentenced to imprisonment for a period of three (3) years.

Appellants Williams and Meier were jointly tried before a jury, commencing on November 13, 1962. Immediately prior to the trial on November 13, 1962, at 9:00 A.M. defendants filed a Motion to Suppress Evidence under Rule 41(e) and the Court did consider said Motion when the same was again raised during testimony of the second witness presented by the Government, Kenneth R. Lankford, the Motion was to suppress all of the evidence ob-

tained from the stolen vehicle. The court considered the Motion to Suppress Evidence (R. 22) and proper exceptions were taken.

Appellants' Motion for Judgment of Acquittal to the indictment was denied, on November 14, 1962, defendants were convicted by the jury as charged in the information.

An appeal duly filed followed to the Court of Appeals to the Tenth Circuit which was denied. A timely Petition for Rehearing was filed by appellants and the same was denied. The Petition for Rehearing sought review of the Court's action in denying the relief sought by the appeal and the Motion for Rehearing which was duly presented.

The evidence adduced as to appellants during the trial was as follows: On or about May 11, 1962, at about 12:05 in the afternoon, Williams approached the assistant County Clerk of Albany County, Wyoming, with the intention of obtaining a title or permit to drive a vehicle through the State of Wyoming. While attempting to obtain the title or permit Williams presented two documents to the assistant clerk, Mrs. Cornelius, Exhibits 1 and 2 (R. 59) which were a Georgia registration and a bill of sale from the State of Georgia. Mrs. Cornelius stated that the vehicle had to be physically inspected. Williams informed her that the vehicle was not available for inspection (R. 11). On cross-examination (R. 12) Mrs. Cornelius stated that it was not customary that the vehicle be physically inspected before license is issued or changed. Mrs. Cornelius advised Williams that they would have to proceed to the sheriff's office so that he could check it out further. When they arrived at the sheriff's office the deputy sheriff, Kenneth R. Lankford, met them and Mrs. Cornelius left. Mr. Williams was detained in the deputy

sheriff's office, by the deputy sheriff, Mr. Lankford, until Williams would identify himself (R. 25).

Mr. Lankford booked defendant Williams for an offense of "investigation of auto theft", there being no such offense (R. 26).

The vehicle for which Williams was trying to get a permit to go through the State of Wyoming was a 1962 Cadillac. The vehicle which Williams and Meier were driving was a 1961 Cadillac, white in color.

Williams advised Lankford that the 1962 Cadillac was black. Lankford stated that the 1962 Cadillac was white because that is what Jack E. Rickards of the National Auto Theft Bureau was supposed to have advised him. However, in truth and in fact, Jack E. Rickards advised Lankford, by telephone, that the vehicle, the 1962 Cadillac was not stolen and that the same was black, which corresponded with the testimony given by Williams (R. 15/16) and that in the testimony given by Jack E. Rickards (R. 4), he advised the deputy sheriff, Kenneth R. Lankford, that the vehicle was black in color as reflected (PR. 6).

Kenneth R. Lankford testified that he had no warrant to arrest Williams or to search the motor vehicle (R. 16). Jack E. Rickards testified that he received information that the 1961 Cadillac was stolen on May 15, 1962, and that this information was furnished to Kenneth R. Lankford four days after, which was on the 15th day of May 1962. This was four days after Williams and Meier were taken into custody. Rickards further testified that Kenneth R. Lankford stated that they would be unable to hold the individual, and that they wanted a rush report, fully indicating that they knew they were illegally holding the appellants Williams and Meier (R. 35).

Defendant Meier, appellant herein, was seen walking outside the county building in Laramie, Wyoming, near a 1961 white Cadillac and he was approached by the deputy sheriff and was stopped and then searched and taken into custody, put under arrest for no apparent reason and was then charged with carrying a concealed weapon after he had been placed under arrest on a pretense. The concealed weapon was given to the deputy sheriff at the sheriff's office at the time Meier emptied his pockets (R. 16/17).

On May 14, 1962, the FBI agent, Robert C. Gustafson, talked to Williams and Meier and at that time Williams was given his first opportunity to contact an attorney. Williams at that time asked Mr. Gustafson to allow him to call an attorney which was allowed and Williams called an attorney in Laramie, Wyoming, by the name of Earl Williams who was not in his office (R. 27).

Mr. Gustafson examined the 1961 Cadillac on May 14, 1962, which was four (4) days after the arrest, without a search warrant, and extracted various evidence therefrom which was presented in Court.

The Court allowed Jack E. Rickards to testify from reports of the National Auto Theft Bureau and investigation conducted by the said Bureau (R. 34). Improper evidence.

Mr. Rickards stated that the 1962 Cadillac was not stolen and that he received information that the 1961 Cadillac was stolen on May 15, 1962, which was four days after defendants had been held in jail on investigation of auto theft.

Appellant Meier, when asked by U. S. Attorney Chaffin, if a Mrs. Ridley, a lady known by Meier, was a drug addict. This was improper and prejudicial to the

jury (R. 49). Mr. Chaffin also asked an improper question on cross-examination "if I told you that your thumb print was on it, would you then remember that you had handled it?" Defendants' counsel made a Motion for Mistrial which was overruled by the Court.

In closing arguments, the U. S. Attorney stated that "when a defendant pleads not guilty, that is something that he has to sustain in order to prove himself not guilty." Ths was improper and a plain error (R. 49).

Further, the U. S. Attorney misquoted a law when he stated "Now, another thing to consider relative to each one of the defendants, that each one of them was apprehended on May 11, 1962, either in the process of committing a felony or trying to commit a felony." Objection was properly interposed to that statement and there was no evidence that a "felony was being committed" or that "the crime was a felony" in any way whatsoever at the time. The Court sustained the objection as to the felony party (R. 49). Plain error under Rule 52(b), Federal Rules of Criminal Procedure.

The U. S. Attorney again committed an error when he asked the jury to compare the signatures of the "Clyde W. Huntsworth" when there had been no evidence as to signatures and there had been no question or issue as to whether the signatures were the defendant Williams'. Further tending to prejudice the jury (R. 50).

The U. S. Attorney again went outside the evidence when he stated "I know that at 5:00 o'clock in the morning on May 9th you don't need any street lights to look in the back of any automobile, because it is light at that time of day." (R. 50). Again going outside the evidence, there was no evidence whatsoever, as to the light at that time of the morning.

Again (R. 51) the U. S. Attorney stated in his closing argument "the calibre of the witness is not the same calibre as government's witnesses." Again, improper comments.

All of the above being prejudicial error and plain error under Rule 52(b) of the Federal Rules of Criminal Procedure and not correctable by any direction of the Court to the jury to disregard the comments.

The Court misunderstood and misquoted the evidence when the District Court stated that there was probable cause to arrest the defendants and the Motion to Suppress Evidence was overruled on the finding by the Court that the government witness Lankford first made a determination that the vehicle was stolen and that he then put the defendants under arrest, which was not true as reflected in (R. 22) where the Court stated "we have this situation, as I view it, before arrest was made of either of the defendants they had checked and determined that the car mentioned in these documents was a stolen automobile and that constituted probable cause. If an individual is found in an automobile that is stolen, that is all you need for probable cause." (R. 22). Defense attorney advised the Court that the automobile was not identified as being stolen until later on the 15th day of May, four days after the original arrest (R. 22).

The Court again stated "I thought in the afternoon he called Denver and got information that the car was stolen." (R. 22). The Court further stated "Now, whether it was the car in New York or the car here, it doesn't make a bit of difference, if these parties here in any way were connected with an automobile that was stolen, that in itself, would constitute probable cause, that is elementary law." (R. 22). Defense attorney continued "But, they did not have that information, Your Honor, until later on in

the afternoon. You see, when they approached this boy, they did not have that information, when they approached Mr. Meier, they did not have that information, that was all suspicion, they didn't have it cleared or checked with the Bureau." The Court stated "Well, you couldn't detect it if you hadn't picked him up, you can't walk down the street behind an individual and detect it." "Overruled, I am ready to rule." The Court then cited. The 1961 Cadillac that the appellants were driving through Wyoming was not discovered to be stolen until May 15, 1962, when the report was made by Jack E. Rickards, the agent for National Auto Theft Bureau.

Therefore, the Court was mistaken and confused on ruling on the Motion to Suppress Evidence and had made up its mind and would not change its thinking.

As the result of the Court's ruling on the Motion to Suppress Evidence (R. 22) the defendants had no further reason to object to or interpose the Motion throughout the balance of the trial, in accordance with Rule 46. The Motion to Suppress Evidence (R. 6) was directed to all evidence taken from the vehicle.

REASONS FOR GRANTING THE WRIT.

1. That defendants Allen M. Williams and Richard Charles Meier were illegally arrested, illegally arrested without a warrant and illegally restrained of their liberties and their rights of counsel under the Due Process Clause as guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States of America, as follows:

(AMENDMENT V)

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(AMENDMENT XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is respectfully submitted that the Record is replete with the showing that the defendants were restrained of their liberty without due process of law, illegally held from May 11, 1962 through May 17, 1962, that they were held for four days on false charges just for the purpose of holding them until an investigation could be concluded.

That the original 1962 Cadillac which was being investigated, was found to have never been stolen and the authorities discovered four days later that the 1961 Cadillac was stolen. Therefore, defendants were deprived of their rights under the Due Process Clause in the Fourth Amendment to the Constitution of the United States of America.

In *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, the court held:

> "As a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a State Court as it is in a Federal Court. Hereby overruling Wolf v. Colorado, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359."

In *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, the Supreme Court of the United States stated:

> "A vague suspicion cannot be transformed into probable cause for arrest by reason of the suspect's ambiguous conduct which the arresting officers themselves have provoked."

The Court further stated:

> "An officer may not make an arrest in his own unchecked discretion upon information too vague and from too untested a source, to permit a judicial officer to accept it as probable cause for an arrest warrant. * * * The history of the use, and not infrequent abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice."

2. That defendants Allen M. Williams and Richard Charles Meier, were illegally arrested, illegally arrested without a warrant and illegally restrained of their liberties and their rights of counsel as guaranteed by the Constitution of the State of Wyoming.

It is respectfully submitted that the defendant Allen M. Williams was restrained in the sheriff's office when he went down to the office in conjunction with the County Clerk to check out the title to a motor vehicle; he was held

for four days in the County Jail. In addition thereto, defendant Meier was stopped on the street and asked to show identification and then told that it was believed that the vehicle he was driving was stolen and they searched him on the street and had his keys taken from him and he was then taken into the sheriff's office and arrested.

Article 1, Section 4, W. S., 1957, the Constitution of the State of Wyoming reads as follows:

> "Security Against Search and Seizure. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized."

In *State* v. *Munger*, 43 Wyo. 404, 4 P.2d 1094, the court stated:

> "As a general rule, a search and seizure is unlawful, except when made under a warrant issued in conformity with the law."

In *Tobin* v. *State*, 36 Wyo. 368, 255 Pac. 788, the court stated:

> "In order to show consent to search without warrant, which would otherwise be illegal, testimony must show that the consent was really voluntary with a desire to invite search, and not merely to avoid resistance."

Under Article 1, Section 6 of the Constitution of the State of Wyoming, W. S., 1957, the section reads as follows:

> "Due Process of Law.--No person shall be deprived of life, liberty or property without due process of law."

Under Article 1, Section 7 of the Constitution of the State of Wyoming, W. S., 1957, the section reads as follows:

> "No Absolute, Arbitrary Power.—Absolute, arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority."

In Article 1, Section 10 of the Constitution of the State of Wyoming, W. S., 1957, the section reads as follows:

> "Right of Accused to Defend.—In all criminal prosecutions the accused shall have the right to defend in person and by counsel, to demand the nature and cause of the accusation, to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process served for obtaining witnesses, and to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

3. The defendants Allen M. Williams and Richard Charles Meier were illegally held in confinement and restrained of their liberty and illegally arrested by the State of Wyoming and illegally held for prosecution by the United States Government.

It is respectfully submitted that defendants were held on a false charge, against their will, and restrained of their liberties until the Federal Government could take over the defendants and charge them with illegally transporting a stolen vehicle in interstate commerce.

In *State* v. *Michaels*, 374 P.2d 989, the Supreme Court of Washington held unlawful:

> "A search made of an automobile to ascertain whether it contained contraband property, with the

arrest of a driver for a traffic violation, which preceded the search, was made for the sole purpose of searching the vehicle."

The Court ruled as follows:

"The driver charged with illegal possession of gambling equipment found in the car as a result of the search, had standing to claim the protection of the constitutional guarantee against unreasonable searches and seizures, as against the state's contention that, because he alleged that the automobile belonged to his wife and because he denied ownership of the gambling equipment, he was not in a position to claim that his constitutional rights were violated. Accordingly, the driver's motion to suppress evidence obtained by the search should have been granted."

In *Dillano* v. *United States*, U. S. Court of Appeals, 10th Circuit, 310 F.2d 680, the Court stated:

"In seeking to establish the defendant's waiver of his constitutional rights and his consent to an otherwise patently unlawful search, the government must prove, by convincing evidence and clear and positive testimony, that consent was given, and must show that there was no duress or coercion, expressed or implied and that consent was unequivocal and specific and was freely and intelligently given."

"The Court will indulge every reasonable presumption against waiver of fundamental constitutional rights concerning searches and seizures on the theory that coercion is implicit in situations where an individual's consent to an otherwise patently unlawful search is obtained under color of the badge."

In *Mapp* v. *Ohio*, *supra*, the court stated as above: evidence obtained by state officers by illegal search and seizure is not admissible in Federal Court against an accused when timely application was made to suppress or exclude the evidence.

4. The evidence submitted in the trial of this case was illegally obtained by the State of Wyoming and illegally used by the United States Government as evidenced in the prosecution of said defendants.

It is respectfully submitted to this Court that defendant Williams was restrained of his liberties and held in confinement without right of counsel and without probable cause; that defendant Meier was stopped on the street without probable cause, searched and arrested on the possibility that he might have been driving a stolen motor vehicle.

Again referring to Article 1, Sections 4, 5 and 6 of the Wyoming Constitution, *supra*. In *Mapp v. Ohio, supra*, the court stated that illegally obtained evidence by a state could not be used in a federal prosecution of a defendant. Further, the abuse of probable cause in *Wong Sun v. United States, supra*, the court stated:

> "Abuse of the power of probable cause, the history of the use and not infrequent abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of officers' whims and caprice. * * * An arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict; the quantum of information which constitutes probable cause, evidence which warrant a man of reasonable caution to believe that a felony has been committed, must be measured by the facts of the particular case."

5. The testimony of the United States Government's witness, Kenneth R. Lankford, was illegally admitted into evidence in view of the fact that said testimony was illegally obtained.

It is respectfully submitted to the Court that the testimony obtained by Kenneth R. Lankford was illegally admitted into evidence in view of the fact that said evidence was illegally obtained and that defendant Williams was illegally restrained of his liberties and held in jail for four days without any formal charge being filed against him, and further, defendant Williams was held without probable cause and defendant Meier was arrested on the street without probable cause, searched and arrested on the possibility that the vehicle he was driving, a 1961 Cadillac, might have been stolen.

In *McDonald* v. *United States*, 307 F.2d 272, the court stated:

> "Evidence obtained by state officers during a search, which, if conducted by federal officers, would have violated defendants' immunity from unreasonable search and seizure, is inadmissible over defendants' timely objection thereto and must be excluded."

Said evidence was timely objected to by the filing of Defendants' Motion to Suppress Evidence, on November 13, 1962, prior to the actual trial of the issues involved and the same objection was raised in the *voir dire* examination of Kenneth R. Lankford, Government witness (R. 17).

In *Wong Sun* v. *United States*, *supra*, the court stated:

> "An arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict; the quantum of information which constitutes probable cause—evidence which would warrant a man of reasonable caution in the belief that a felony has been committed, must be measured by the facts of the particular case."

> "The history of the use and not infrequent abuse of the power to arrest, cautions that a relaxation of the fundamental principles of probable cause would leave law-abiding citizens at the mercy of the officers' whims or caprice."

In *Mapp* v. *Ohio*, *supra*, the court stated that illegally obtained state evidence is not admissible in federal court against an accused, when timely application was made to suppress or exclude the evidence.

6. That the testimony of the United States Government's witness, Robert C. Gustafson, was illegally admitted into evidence on the grounds of hearsay, and further that said witness was allowed to testify, under defense counsel's objection, to matters upon which there was insufficient foundation laid as to his qualifications.

It is respectfully submitted to the Court that on a number of objections made by defense counsel, upon the ground that the witness was not qualified and that insufficient foundation was laid, the court stated that if defense counsel wanted foundation laid he should lay it himself, thus placing the burden on defense counsel to qualify the state's witnesses, thereby putting defense counsel in an embarrassing position before the jury; that it is not the duty of defense counsel to qualify the government's witnesses as to their qualifications in testifying on certain matters (R. 30).

That the evidence which Robert C. Gustafson, the government's witness, testified was illegally obtained; said evidence was obtained on the 1961 Cadillac illegally when defendant Meier was arrested without a warrant and without probable cause and said evidence was used by the government when the same was illegally obtained by Kenneth R. Lankford at the time of the initial arrest of

defendants herein, contrary to the opinion of the court in *Mapp* v. *Ohio, supra,* wherein the court stated that evidence obtained by illegal search and seizure is not admissible in a federal court against an accused, where timely application was made to suppress or exclude the evidence.

The court further stated in *Mapp* v. *Ohio, supra,* that as a matter of due process, evidence obtained by search and seizure in violation of the Fourth Amendment is inadmissible in a state court as it is in a federal court.

7. That the testimony of the United States Government's witness, Jack E. Rickards, was illegally allowed to come into evidence on the grounds that his testimony was based on records in his office which were not prepared by said witness, but were prepared by other parties who were not under his supervision and were purely hearsay and prejudicial to the jury.

It is respectfully submitted to the Court that the testimony of Jack E. Rickards was predicated primarily upon records and reports that his office, the National Automobile Theft Bureau, received from other offices throughout the nation and that said reports were funneled to him at his request and he was unable to testify as to the method by which the reports were gathered nor did he know anything about how they were gathered, nor was he able to say under what conditions the reports were made and whether or not said parties compiling the reports were qualified (R. 33, 34, 35).

The court further allowed the witness to read right from the reports which were not his reports nor were the reports under his own supervision (R. 34). General statements and hearsay information collected in an investigation for the purposes of the business records within the

meaning of the Statute. *Palmer* v. *Hoffman*, 318 U.S. 109; 28 U.S.C., Section 1732.

8. That defense counsel was required by the Court, on several occasions, to qualify United States Government witness, Robert C. Gustafson, as to his qualifications stating if defense counsel raises question of qualification of United States Government witnesses, the burden of qualifying said witnesses then transfers to the defense counsel who raises the questions, which is in error.

It is respectfully submitted to the Court that it is axiomatic to the law that the burden of qualifying Government witnesses is upon the Government and that the burden of qualifying the defense witnesses is upon the defendant; that said ruling by the court herein is in error when the same ruling was made before the jury it forced the defendant to take certain steps and attempt to qualify the witness and in refusing to qualify the witness, defendants were put at a disadvantage before the jury (R. 28, 29).

9. That the United States Attorney, Robert N. Chaffin, committed prejudicial error on his cross-examination of defendant, Richard Charles Meier, when he asked Mr. Meier whether the lady he had associated with was a known drug addict.

It is respectfully submitted to the Court that the jury was unnecessarily prejudiced when the United States Attorney, Mr. Chaffin, asked defendant Meier, on the stand, if he ever lived with Dorothy Ridley and defendant Meier replied that he had (R. 49). Mr. Chaffin then asked defendant Meier if Dorothy Ridley was a drug addict, to which defense counsel objected as having no bearing; the court sustained the objection that the question was prejudicial to the jury on purpose. By Mr. Chaffin ask-

ing defendant Meier if Dorothy Ridley was a known drug addict, the same was merely interposed to prejudice the jury and for no other reason (R. 49).

Mr. Chaffin further prejudiced the jury when he asked defendant Meier, "If I told you that your thumb print was on it, would you then remember that you had handled it?" There was no such evidence in the Record and assuming something not in evidence on cross-examination, and further interposed merely for the purpose of prejudicing the jury (R. 49).

In a case somewhat similar, *Rankin* v. *State of Florida*, 143 So.2d 193, the supreme court stated:

> "If the jury got, from the reading of the question, purportedly asked the witness at the time of the interview, and the answer presumably given and repeated at the trial, a description with which appellant had been charged and convicted, this procedure we cannot sanction, we think it was prejudicial error that requires a reversal of judgment."

10. That the United States Attorney, Robert N. Chaffin, committed prejudicial error when he asked Defendant, Richard Charles Meier, on cross-examination, "If I told you that your thumb print was on it would you then remember that you handled it?", the same not being true and misleading to the court and prejudicial to the jury.

It is respectfully submitted to the Court that the question was primarily interposed by Mr. Chaffin, on cross-examination, purely to prejudice the jury, there being no such evidence presented in court and assuming something not in evidence.

11. That the United States Attorney, Robert N. Chaffin, committed reversible error during his closing

argument in this case when he stated facts that were not in evidence and further when he misquoted the law to the jury. In stating to the jury that when a defendant pleads not guilty, then it is something that he has to sustain in order to prove himself not guilty; and further when he stated to the jury that defendants were in the process of committing a felony or trying to commit a felony at the time they were arrested, which was improper and not correct.

It is respectfully submitted that there has been no showing in this court that at the time the defendants were arrested, that they were in the process of committing a felony or attempting to commit a felony and, thus, assuming something which was not in evidence and was not shown by the prosecuting attorney, and accordingly, assuming something which was not in evidence. Further, the prosecuting attorney wrongly stated to the jury that when a defendant pleads not guilty he then has the duty to sustain the fact he is not guilty and has the duty to prove himself not guilty. This is obviously in error and deliberately misleading to the jury. The prosecuting attorney wrongfully misquoted the evidence to the jury when he stated that the jury could compare the signatures of Clyde W. Huntsworth to the signatures that are on the title and that they could decide for themselves what the defendant was attempting to do.

The prosecuting attorney again went outside the evidence when he stated that he knew that 5:00 o'clock in the morning on May 9 in Washington it was not dark, there being no such evidence in the record and was merely a statement of counsel not being predicated on any evidence whatsoever (R. 49, 50).

12. That the United States District Judge for the District of Wyoming, the Honorable Ewing T. Kerr, com-

mitted reversible error when he instructed the jury as to the law on the witness taking the stand in his own behalf and as to the law on reasonable inference to be drawn from the evidence and upon the law of intent that a person is responsible for the natural and probable consequences of his act.

It is respectfully submitted to the Court that the Honorable Ewing T. Kerr, Judge of the District Court for the District of Wyoming, committed reversible error in instructing the jury that they have a right to take into consideration that they are defendants in this case and that may or may not affect the credibility of the defendants' testimony. The same was improper, that the credibility of the defendants' testimony stands on the same equal par as any other witness; that the instruction was improper. That the instruction on circumstantial evidence was not correct and was improper (R. 56). That the instruction of the natural and probable legitimate consequences of his own acts are not applicable in criminal proceedings, particularly in an instruction as applying to circumstantial evidence.

In *McDonald* v. *United States*, 284 F.2d 232 (C.A.D.C.), the court held:

> "The failure of a trial judge to charge a jury on the presumption of innocence was error. The charge on reasonable doubt did not dispense with the necessity of charging on burden of proof."

In *Holland* v. *United States*, 348 U.S. 121, 75 S. Ct. 127 (1954), where it was contended that it was error for the trial judge to refuse to instruct, that where the government's evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt, the court said:

"The support for this kind of instruction in the lower court decisions, Garst v. U. S., 4 Cir., 180 F. 339, 343, but the better rule is that where the jury is properly instructed on the standard for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

13. That the Motion to Suppress Evidence, filed by the defendants, should have been sustained by the court upon the grounds that said evidence was procured through unlawful search and seizure, in violation of the Fourth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America, guaranteeing the right to privacy free from unreasonable state intrusion. The Fourth Amendment to the Constitution of the United States of America states:

(AMENDMENT IV)

(Security from Unwarrantable Search and Seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States of America states:

(AMENDMENT XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is respectfully submitted to the Court, in the evidence heretofore recited, that was obtained by the state illegally and used by the Federal Government illegally; that under *Mapp* v. *Ohio, supra,* wherein the court stated:

> "As a matter of due process, evidence obtained by search and seizure in violation of the Fourth Amendment, is inadmissible in a State Court as it is in a Federal Court."

14. That the evidence obtained against the defendants herein was illegally obtained in violation of the protection granted in the Fifth Amendment to the Constitution of the United States of America. The Fifth Amendment states as follows:

(AMENDMENT V)

(Rights of Accused in Criminal Proceedings)

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15. That defendants were illegally denied rights of counsel in violation of their rights under the Fourth, Fifth

and Fourteenth Amendments to the Constitution of the United States of America.

It is respectfully submitted to the Court that the evidence shows that defendants were held, for four days, without being allowed to contact an attorney, in violation of their rights under the Constitution of the State of Wyoming, Article 1, Sections 4, 5 and 6 and under the United States Constitution, the Fourth, Fifth and Fourteenth Amendments, as recited in the Record at pages 14, 15, 16, 18 and 35, wherein defendants were held upon some fictitious charge merely to be held until the examination could be concluded as to whether the vehicle was or was not stolen, and further, they were not allowed to have counsel until four days after they had been held in jail, or until the time of trial, in violation of their rights under said Constitution.

In *Jones* v. *United States*, 4 L. Ed. 2d 697, 703, the court held that the elements which have caused the dilemma, *i. e.*, that possession both convicts and confers standings, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. In a case involving a prosecution of illegal possession of narcotics, the court pointed out that to hold that defendant failed to acknowledge interest in narcotics or the premises in which they were seized prevented his attack upon the search would be to permit the Government to have the advantage of contradicting positions of a basis for conviction; that the defendant's conviction flows from the possession of narcotics at the time of the search, and yet the fruits of such a search upon which conviction depends were admitted into evidence on the ground that defendant did not have possession of the narcotics at the time; that the prosecution in the instant

case, thus subjects defendant to the penalty meted out to one in lawful possession while refusing him the remedies designed for want in that situation; that it is not consonant with the amenities of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government; and that the possession on the basis of which defendant was to be and was convicted was sufficient to give him standing under any fair and rational concept of the requirements of Federal Criminal Procedure, Rule 41(e). The court also pointed out that Rule 41(e) should not be applied to allow the Government to deprive the defendant of standing to bring a Motion to Suppress the indictment in general terms while prosecuting for possession.

CONCLUSION

WHEREFORE, it is respectfully urged that for the foregoing reasons herein summarized, there was prejudicial error in the findings of the judgments in the lower court, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Cheyenne, Wyoming,
Counsel for Petitioners.

APPENDIX A

(Filed United States Court of Appeals, Tenth Circuit, September 30, 1963. Robert B. Cartwright, Clerk).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1963

ALLEN M. WILLIAMS, also known as Clyde Walter Huntsworth, and Fred Westley Anderson, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 7257
RICHARD CHARLES MEIER, also known as George E. Richmond. *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 7258

Appeals from the United States District Court for the District of Wyoming.

Vincent A. Ross, of the firm of Ross and Buge, Cheyenne, Wyoming, for Appellants.

Robert N. Chaffin, United States Attorney, Cheyenne, Wyoming, (Leroy V. Amen, Assistant U. S. Attorney, Cheyenne, Wyoming, with him on the brief), for Appellee.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

The appellants, Williams and Meier, were convicted of transporting a 1961 Cadillac automobile from Portland, Oregon to Laramie, Wyoming, knowing the same to have been stolen, in violation of 18 U.S.C. §2312. They were arrested in Laramie by state officers without a warrant, who then searched the automobile and took into their possession a quantity of personal effects belonging to the defendants. A few days later, while the defendants were still held in state custody, an agent of the F.B.I. made a more thorough search and discovered concealed in the trunk paneling of the Cadillac a number of incriminating articles. The principal assignments of error presented here relate to the admission in evidence of the results of these two searches.

Shortly after noon on May 11, 1962, Williams appeared at the office of the County Clerk of Albany County, Wyoming, presented a Georgia registration and bill of sale for a 1962 Cadillac automobile, and requested that he be issued a Wyoming title. He advised the clerk that he was Clyde W. Huntsworth, the person named in the bill of sale and the Georgia registration, and whose signature appeared thereon. Williams said he had arrived in Laramie a short time before and wanted the title because he expected to live in Wyoming. The vehicle was not available

for inspection, and Williams was told that the matter must be cleared through the County Sheriff's office before a Wyoming title could be issued. When he appeared at the Sheriff's office, Williams told the Undersheriff he was traveling with a Fred W. Anderson in a blue-green 1961 Oldsmobile with a Washington license plate, which was parked in front of the Court House. When asked, he said that his identification cards and wallet were in that car. The Denver office of the National Auto Theft Bureau was then requested to obtain information as to the title of the 1962 Cadillac. Williams agreed to remain at the Sheriff's office until the report was received. During the afternoon the National Auto Theft Bureau advised that the 1962 Cadillac for which Williams attempted to obtain a Wyoming title had not been reported stolen, but was owned by a Chicago resident and was white in color. Williams claimed that he had bought the vehicle in Georgia for $6200.00, and that it was stored in New York at an address he did not know, and was black in color. At the time Williams had in his possession an Oregon driver's license issued to Fred W. Anderson, and a Georgia driver's license issued to Fred Westley Anderson. The Undersheriff then set out to locate the Mr. Anderson with whom Williams said he was traveling, and the 1961 Oldsmobile. An automobile of this description was found near the Court House but it was in the possession of persons having no connection with Williams. A person (Meier) who had been seen walking around the Court House looking up at the jail was observed near a white 1961 Cadillac parked on the street some distance from the Court House. As he walked away from that automobile, Meier was stopped and was questioned by the Undersheriff. At that time he gave his name as George E. Richmond. He said the 1961 Cadillac, which bore a Nebraska license, belonged to "a fellow by the name of

Hamilton with whom I came to Laramie." He produced four unmarked keys which fit the Cadillac. The Undersheriff testified that when he first spoke to him, Meier made what appeared to be a threatening gesture by putting his hand inside his coat as if to reach for a weapon. Later a pencil-type tear gas gun was found in his possession. Some time later Williams and Meier were charged in the state court.[1]

While Williams and Meier were held by the state officers an agent of the F.B.I. made an investigation to ascertain the ownership of the 1961 Cadillac in which they were traveling. He obtained the true identification numbers of the automobile and made a thorough search of its interior. Secreted in the paneling of the trunk he located bags containing material which might be useful in the theft of automobiles, including a large number of master keys which fit nearly all General Motor cars.[2] It

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1. Meier was charged with carrying a concealed weapon and carrying a concealed weapon with intent to assault. He pleaded guilty to the former charge and the latter was dismissed. Williams was charged with forgery and forgery with intent to defraud, both of which were dismissed before defendants were released to federal custody.

2. A black leather bag and two paper bags, or envelopes, were found. The leather bag contained a piece of black cloth, a pen flashlight, a box of tear gas shells, a wire to which was attached a pen flashlight and 65 master keys for General Motor automobiles, a tube of graphite powder, an altered socket wrench, a wire tool used for opening car doors, and a pair of black gloves. One of the paper bags contained 20 metal cutting dies for stamping numbers and letters in metal.

The other bag contained a 1961 Georgia license plate, a 1961 Georgia title registration for that license, a bill of sale for the described vehicle, and an identification plate from a 1961 Cadillac bearing the same identification numbers. That car belonged to a person living in Detroit, Michigan. It also contained Oregon license plates, registration, a Georgia bill of sale, and a vehicle identification plate for a 1962 Thunderbird, issued to a Fred Anderson. This vehicle belonged to a person living in Cleveland, Ohio. The search also revealed two applications for vehicle titles to the West Virginia Department of Motor Vehicles.

was learned through the investigation that the 1961 Cadillac belonged to J. S. Lunsford of Portland, Oregon. Federal charges were then filed against the two and they were taken into custody by the United States Marshal. Lunsford testified at the trial that the car had been stolen from his garage on the night of April 27, 1962. Williams and Meier had been in Portland and left the night the car disappeared.

When the case came on for trial, the defendants moved to suppress the evidence obtained from the "stolen vehicle" alleging in writing that it was "illegally seized without a warrant." This motion was not presented to the court, and the defendants proceeded to trial without objection. During the trial an objection was made to the admission of the evidence found by the state officers in the automobile, upon the ground that the state arrest was without probable cause and the search and seizure by the state officers was illegal.[4] The court heard evidence in the absence of the jury, and found that the original arrest was made on probable cause and overruled the objection.

We agree with the trial court that from all the facts and circumstances, the state officers had probable cause to believe that Williams and Meier had committed a

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3. It is now settled that evidence obtained through an unreasonable search and seizure by state officers is not admissible over a timely objection in a federal criminal trial. Elkins v. United States, 364 U.S. 206. Cf. Mapp v. Ohio, 367 U.S. 643; Ker v. California, 374 U.S. 23.

4. When defendants' counsel had completed the showing on his objection, the court inquired as to the nature of the motion under consideration, to which counsel replied: "My motion is to suppress all the testimony that has been presented here by Mr. Lankford as to what the boys did, what they supposedly have done, what items were taken out of this car and the evidence they have taken out of this car, that it has been taken out first, without a warrant, without due process of law."

felony, and that the search was made incident to that arrest was lawful.

Mere suspicion, of course, does not constitute probable cause for an arrest. Wong Sun v. United States, 371 U.S. 471. It is not necessary, however, that an arresting officer be possessed with evidence sufficient to establish guilt. Probable cause deals with probability, as said in Brinegar v. United States, 338 U.S. 160, 175-176:

> "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' . . . Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[5]

See Ker v. California, supra; Henry v. United States, 361 U.S. 98; State v. George, 32 Wyo. 223, 231 P. 683.

At the suggestion of Williams, the Undersheriff went to check on the 1961 green Oldsmobile. He was then continuing an investigation that Williams had requested him to make relative to the 1962 Cadillac. By this time, the

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5. In Brinegar v. United States, 338 U.S. 160, 176, the court also said:

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens to the mercy of the officers' whim or caprice."

officer knew that this car was not owned by Williams, and was not white, or stored in New York as stated by Williams. From the information which the Undersheriff had, it was quite obvious that the Georgia papers were not genuine and that the Wyoming title which Williams attempted to obtain was not to be used legally in connection with the vehicle described in those papers. When Meier was found with keys that fit the 1961 Cadillac, he gave a name which did not correspond to that given by Williams to his traveling companion, and he in turn gave as the name of his traveling companion one which did not correspond with the name furnished by Williams. After his questioning of Meier, the officer could reasonably conclude that Williams did not want him to locate Meier or the car in which they were traveling and that the false information as to the 1961 Oldsmobile was a ruse to divert him away from Meier and the 1961 white Cadillac. We are satisfied that the Undersheriff had reasonably trustworthy information sufficient to warrant his belief that an offense had been or was being committed. Moreover, with the possible exception of the Cheyenne newspaper on which the name "Clyde W. Huntsworth" was written five times on the margin, there was nothing incriminating about the articles seized by the state officer and their admission in evidence was not prejudicial.

The search by the F.B.I. agent made several days after the arrest by state officers and while the defendants were confined in jail, could not be sustained as incident to the original lawful arrest. Sirimarco v. United States, 10 Cir., 315 F.2d 699, cert. denied June 10, 1963, but the defendants did not seek to suppress this evidence before the trial by motion, as contemplated by Rule 41(e), Fed. R. Crim. Proc., and did not, during the trial, object to its admission in evidence upon the ground that it was

obtained through an unlawful search.[6] The legality of this search was never considered by the trial court. Accordingly, the issue is not before us for review. Gendron v. United States, 8 Cir., 295 F.2d 897. Furthermore, throughout the proceedings the defendants expressly disclaimed any interest, proprietary, possessory, or otherwise, in any of the articles seized by the F.B.I. agent which were incriminating.[7]

It is well established in this circuit, and elsewhere, that the right to protection against unreasonable search and seizure is personal, and a defendant in a criminal case who claims no proprietary or possessory interest in the seized property has no standing to object to the method of seizure. Bakersville v. United States, 10 Cir., 227 F.2d 454; Wilson v. United States, 10 Cir., 218 F.2d 754, and cases therein cited. Cf. Jones v. United States, 362 U.S. 257, 78 A.L.R.2d 233. This rule is particularly applicable where the property seized was taken from a stolen automobile to which the defendants had no title or legal right to possession. United States v. Serrano, 2 Cir., 316

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6. The objections made to the introduction of this evidence is illustrated by the following:

"Q. Now, relative to Government's Exhibit 44, which has already been entered into evidence and is represented by a Georgia license plate 15A1194, you testified a few minutes ago as to your investigation and ownership of that vehicle. Now, relative to these Government exhibits I will ask you if your investigation has revealed the owner of the vehicle referred to in the Government exhibits—

MR. ROSS: To which we object, Your Honor; not material, no foundation laid and anything he is liable to say is hearsay unless foundation is laid."

7. Among the articles seized was a title registration and license plates for a Thunderbird automobile Williams said he had given to Hamilton, and that he did not know that they were in the 1961 Cadillac. The Thunderbird registration was issued to Fred Anderson, not Williams.

F.2d 356; Anno. 78 A.L.R. 2d 246, §8; Anno. 50 A.L.R.2d 531, §10; Jones v. United States, supra, recognize this principle.

During the trial the F.B.I. agent and the Special Agent of the National Auto Theft Bureau were permitted to testify, over the objection that it was hearsay, as to what they had learned through their investigation relative to the ownership of the stolen 1961 Cadillac, and the ownership of the vehicles for which the license plates, registrations, bills of sale and identification plates had been found hidden in the trunk panel of the stolen Cadillac. Part of their testimony was based upon records of the National Auto Theft Bureau and reports prepared by other agents who were not present or from information which had been obtained through telephone and teletype communications with branch offices or other agents, and not upon personal knowledge of the witness. Assuming that the evidence was hearsay, its admission was not prejudicial. The stolen car was identified by the testimony of its true owner. There was no issue as to the identity of the other items, and we are convinced that their admission in evidence did not affect substantial rights of the defendants. Rule 52(a), Fed. R. Crim. Proc. There was a suggestion during the trial that this evidence was admissible under the provisions of the Business Records Act, 28 U.S.C. §1732. The government did not urge that point here, but generally statements and hearsay information collected in an investigation for the purposes of the trial of a case are not business records within the meaning of the statute. Palmer v. Hoffman, 318 U.S. 109.

We have considered the other assignments of error and find them to be without merit.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALLEN M. WILLIAMS, also known as Clyde Walter Huntsworth, and Fred Westley Anderson,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 7257 and 7258
Judgment

RICHARD CHARLES MEIER, also known as George E. Richmond,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Sixteenth Day, September Term, Monday, September 30th, 1963.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges

No. 7257

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Allen M. Williams, appellant, surrender himself to the custody of the United States Marshal for the District of Wyoming, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 7258

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Richard Charles Meier, appellant, surrender himself to the custody of the United States Marshal for the District of Wyoming, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

APPENDIX C

United States Code, Title 18, §2312.

§ 2312. Transportation of stolen vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 630

ALLEN M. WILLIAMS AND RICHARD CHARLES MEIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 323 F. 2d 90.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1963. A petition for rehearing was denied on October 18, 1963. The petition for a writ of certiorari was filed on November 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether probable cause existed for petitioners' arrests and the search and seizure of the automobile in which they had come to town.

2. Whether various trial rulings were correct.

STATUTE INVOLVED

18 U.S.C. 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 31–322, Wyoming Statutes Annotated (1959) provides in pertinent part:

> All officers are hereby empowered, authorized and directed to take and hold possession of any automobile * * * which such officer may have good and sufficient reason to believe is not in the rightful possession of the driver or person in charge thereof for such reasonable time as may be necessary; * * *

STATEMENT

After jury trial in the United States District Court for the District of Wyoming, petitioners were convicted on a one-count information charging the interstate transportation of a stolen vehicle, knowing the same to have been stolen (18 U.S.C. 2312). Petitioner Williams was sentenced to imprisonment for four years, and petitioner Meier was sentenced to imprisonment for three years. The court of appeals affirmed.

The pertinent facts may be summarized as follows:

1. At approximately 12:05 p.m. on Friday, May 11, 1962, petitioner Williams came to the office of an assistant county clerk in Laramie, Wyoming, in order to obtain a Wyoming title on a 1962 Cadillac. He presented to the clerk a bill of sale and a Georgia certificate of title purportedly covering the Cadillac, both made out to "Clyde W. Huntsworth". Petitioner assured the clerk that he was Huntsworth (Tr. 4–6, 13; see Exs. 1 and 2 at R. 59).[1] Because of prior experience with Georgia certificates and stolen vehicles, the clerk would not issue title without a physical examination of the car. On ascertaining that the vehicle was not available for inspection and that petitioner would not leave the Georgia papers with her, the clerk communicated with undersheriff Lankford (Tr. 7, 15–16, 21). With the Georgia papers in her hand, the clerk then led petitioner to Lankford's office (Tr. 7).

Lankford told petitioner that because of prior experience with Georgia registrations, a personal inspection of the vehicle would be required. Petitioner replied that he did not have the vehicle and that it was in New York (Tr. 21). He stated that his name was Huntsworth, but that he did not have any personal identification papers with him because his wallet was in the car in which he was traveling. He then told Lankford that he was traveling with a man

[1] "Tr." refers to the transcript of the trial, a copy of which we are lodging with the Clerk of this Court. "R." refers to the 61-page Transcript of Record used in the court of appeals, a copy of which is on file with the Clerk of this Court.

named Anderson in a blue-green 1961 Oldsmobile bearing Washington license plates, and that the car was parked in front of the court house (Tr. 22). At approximately 12:45 p.m. Lankford called the National Auto Theft Bureau in Denver and requested a "routine check" on the 1962 Cadillac which petitioner had been trying to register. At approximately 2:30 p.m., Lankford received information that the 1962 Cadillac belonged to one Dixon in Chicago (Tr. 27, 105) and that it had not been reported stolen (Tr. 105; see Tr. 98–99).

Lankford informed petitioner of what he had learned from the Auto Theft Bureau, and petitioner replied that he "just didn't understand this kind of business" and that he had paid $6,200 in cash for the Cadillac (Tr. 106). Lankford then arrested petitioner without a warrant and charged him with "investigation of auto theft" (Tr. 28, 29, 106).

In the meantime, Lankford had assigned a highway patrolman to find the blue-green Oldsmobile with Washington license plates to which petitioner had referred (Tr. 24). The patrolman discovered such an automobile parked near the court house, and Lank-

[2] In a hearing out of the presence of the jury, petitioner testified that his liberty was restrained following his first conversation with Lankford. He said that Lankford asked him to wait while information was checked with the Theft Bureau, and that he would have to be locked up in order to eat lunch (Tr. 50–52). Lankford said that petitioner was not under arrest until after receipt of information from the Bureau; that he could have left any time he established his identity; and that had petitioner left "I don't know what I could have done about it" (Tr. 36).

ford talked to its occupants. He was satisfied that they had come to the building to pay their taxes and that they had nothing to do with petitioner Williams (Tr. 24–25).

Early in the afternoon—some time after petitioner Williams was arrested—Lankford was told by the assistant county clerk that she had observed a man walking back and forth in front of the court house, looking up toward the jail (Tr. 10, 41). Lankford, who was then "looking for Mr. Anderson" (*i.e.*, petitioner Williams' alleged companion) (Tr. 31), went into the street where he observed petitioner Meier walk down several streets and then return to a white 1961 Cadillac parked near the court house (Tr. 31). He approached petitioner Meier and asked him if he owned the 1961 Cadillac. Petitioner responded that he did not, but that it was owned by one Hamilton, with whom petitioner had come to Larganie (*ibid.*). When asked if he had keys to the car, petitioner gave Lankford four unmarked keys[1] which opened the Cadillac "perfectly" (Tr. 32). Lankford then arrested Meier for "investigation of the Cadillac" (Tr. 32).[2] Meier identified himself as "George E. Richmond" (Tr. 72).

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[1] Lankford defined "unmarked keys" as follows: "An unmarked key is a key blank with no numbers on them. As they come from the factory they are numbered. These keys had no numbers on them" (Tr. 32).

[2] During a hearing out of the presence of the jury, Meier testified that after he gave Lankford his wallet, Lankford searched him and found the keys. Lankford then told him he thought the Cadillac was stolen, took the numbers from the door post and the certificate of title from the glove compartment, and brought Meier to the station (Tr. 65).

2. On arresting Meier, Lankford took the 1961 Cadillac into custody and searched it. On the seats, in the trunk and in the glove compartment, he found the following objects which were ultimately introduced into evidence over petitioners' objections: a newspaper on which the name "Clyde W. Huntsworth" had been handwritten five times (Tr. 79); a used car guide (Tr. 80); a book of automobile titles and transfers, not further described (Tr. 81); a screwdriver (Tr. 81); a carton of food coloring (Tr. 82); a pair of pliers (Tr. 82); a claw hammer (Tr. 82); a Georgia license plate (Tr. 83); a box containing several items, only four of which were described for the record—a jar of alum, a pair of shoes, a can of black pepper and a bottle of glycerine (Tr. 85, 88); a box of road maps (Tr. 89); a hair piece (Tr. 91); a Nebraska automobile registration slip (Tr. 92–93); and a Nebraska certificate of title made out to Curtis G. Hamilton, Jr. (Tr. 93–94).

3. On Monday, May 14, 1962, petitioners, who were still being held on the charge of "investigation of auto theft" (Tr. 43–44), were arraigned in "Justice Court." Williams was charged with forgery (Tr. 43), apparently because he had signed the name "Huntsworth" to the application for registration. Meier, who was carrying a tear gas pencil in his shirt pocket when he was first arrested—and who may have reached for it when he was approached by Lankford (Tr. 42)—was charged with carrying a concealed weapon with intent to assault (Tr. 42). These local charges were subsequently dismissed when petitioners

were transferred to federal custody on May 17 (Tr. 123).

On the same day, an F.B.I. agent named Gustafson arrived at the sheriff's office in Laramie, having been informed on May 11 of the arrest of petitioners (Tr. 145–146). Gustafson spoke with petitioner Williams, advised him that he did not have to make any statement, and permitted him to call an attorney (Tr. 147).[5] During the interview, Williams admitted that Huntsworth was not his real name. He told Gustafson that he and George Richmond (the name Meier had given) were driving the 1961 Cadillac from Seattle to Nebraska on behalf of Curtis Hamilton, whom they were to meet in Nebraska (Tr. 147–148). Gustafson also spoke with petitioner Meier, who gave substantially the same story regarding petitioners' possession of the 1961 Cadillac (Tr. 207).

Some time on May 14, after he had spoken to Williams (Tr. 149), Gustafson searched the 1961 Cadillac. He discovered that the serial numbers on the left front frame and on the motor of the automobile did not match the serial number on the bell housing of the engine (Tr. 150–153).[6] A further search of the automobile uncovered a "well" near the left rear fender, in which there were stored a leather bag and

[5] In the course of his own testimony, Williams stated that he was permitted to call counsel within four hours of his arrest on May 11 (Tr. 266).

[6] The bell housing number is apparently a concealed serial number placed on the engine "so that automobiles can be traced" (Tr. 151) even if the more obvious serial numbers are altered.

two paper bags (Tr. 165). In these bags Gustafson found the following objects, which were introduced into evidence at the trial over petitioners' objections:[7] 63 keys for General Motors cars; a device which could be used to cover a flashlight; a flashlight; a device used to open automobile windows; ten metal cutting dies used for stamping numbers; a bill of sale for a 1961 Cadillac with serial number 61K077327; a Georgia certificate of title registration bearing the same number; a serial number identification plate bearing the same number (which had been missing from a Cadillac owned in Detroit); a Georgia license plate; two Oregon license plates; a bill of sale covering a Ford Thunderbird automobile; an Oregon registration card for the same automobile issued to Fred Anderson; a serial number identification plate bearing the number of the Thunderbird (which had been missing from a Thunderbird owned in Cleveland); and two applications for West Virginia motor vehicle titles (Tr. 164–200).

5. In addition to the call which had been placed to the Auto Theft Bureau regarding the 1962 Cadillac which petitioner Williams had attempted to register (p. 4, *supra*), Lankford had placed a similar call for a check on the 1961 Cadillac which had been taken into custody (Tr. 98). The automobile was traced by the number on its vehicle identification plate, and

[7] None of the specific objections made to the admission of this evidence questioned the validity of the search. However, we accept the earlier objections made to the admission of items taken from the car by Lankford (Tr. 69) as applicable to all subsequent searches as well.

the Auto Theft Bureau learned that the automobile with that serial number was still in the possession of its original owner, although the identification plate had been reported missing from the car approximately six months before (Tr. 223). After Gustafson discovered the bell housing serial number the automobile was traced, on May 15, 1962, to its owner in Portland, Oregon, who reported it as having been stolen from his garage on April 27, 1962 (Tr. 133–138).

6. Petitioners were thereupon charged with interstate transportation of a stolen vehicle, knowing the same to have been stolen. Both testified at their trial and said that they were driving the car from Seattle to Nebraska at the request of and for the benefit of Hamilton. Williams testified that he believed Hamilton to be an automobile dealer who would introduce him and Meier to further automobile transactions (Tr. 251–252). As to the items found in the fender well, Williams said that when he and Meier picked up the car from Hamilton there was a brief period of time during which he and Meier left the car with Hamilton, and that at that time Hamilton must have hidden the items in question (Tr. 254). The F.B.I. was unable to locate the alleged Curtis Hamilton (Tr. 215).

ARGUMENT

This case is a classic illustration of the validity of this Court's observation in *Brinegar* v. *United States*, 338 U.S. 160, 174, that if rigid standards were to be applied "in determining probable cause for an arrest or for search and seizure, more especially in cases

such as this involving moving vehicles used in the commission of crime, few indeed would be the situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end." The circumstances surrounding the arrest of petitioner Meier and the searches of the 1961 Cadillac might, in the abstract, appear to raise serious questions. However, we submit that when considered in light of the type of offiense of which petitioners were suspected and "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (338 U.S. at 175), the arrest and subsequent searches were permissible under federal and state law. Since this case involves a unique set of facts and since, in our view, the decision of the court of appeals was correct, we submit that there is no occasion for further review by this Court.

1. The *modus operandi* used in car thefts of the sort involved in this case is important to an understanding of the action taken here by law enforcement officials. As spelled out in the government's summation to the jury (Tr. 359–360) and supported by the testimony of an official of the National Automobile Theft Bureau regarding the facts of this case (Tr. 218–232), the scheme is as follows: First, the identification plate is removed from an automobile parked on a city street or in a parking lot. The thief, knowing the color, design and make of the automobile, then registers that automobile in some other State and obtains the usual title papers. (This can be done readily in Georgia, which does not require proof of

title, or may be accomplished in many other States if an appropriate bill of sale is forged.) Thereafter, being in possession of title papers for an automobile of a certain color, design and make, the thief steals a similar automobile and affixes the stolen identification plate to the door post in place of the one attached by the manufacturer. Consequently, he holds title papers and apparently rightful possession of an automobile *which has never been reported stolen* and does not assume the risk of being caught driving an automobile without registration appropriate for that particular vehicle.

2. In the present case, undersheriff Lankford clearly had probable cause to arrest petitioner Williams when he did. Petitioner had (1) used suspicious Georgia papers (2) under an assumed name for which he could supply no supporting identification (3) to register an automobile allegedly garaged at an unknown address in New York (4) which was actually reported in the possession of a Chicago resident (5) and which Williams claimed to have purchased in Georgia and not in Chicago. Under these circumstances the officer had probable cause to suspect Williams of participation in a felony involving a stolen vehicle. Under Wyoming law, automobile theft is a felony (Wyoming Statutes Annotated (1959) Section 31-317), and an officer may arrest without a warrant one whom he has probable cause to suspect of having committed a felony. See *State* v. *George*, 32 Wyo. 223; *State* v. *Rotolo*, 39 Wyo. 181. Indeed, it is difficult to imagine a state of facts consistent with innocence which could have explained why petitioner was seeking to

register in Wyoming an automobile which was then in the possession of a Chicago resident. Moreover, since no statement or other evidence that was the "fruit" of Williams' arrest was introduced at the trial, the validity of Williams' arrest is not significant *per se*. It is important only as it bears on the arrest of petitioner Meier and the subsequent searches of the automobile.

3. As to petitioner Meier, the facts also establish probable cause for arrest. After having cleared the occupants of the blue-green Oldsmobile, the officer had sound reason to believe that Williams' associate was waiting near the court house in a different automobile. When he was informed that a man was walking back and forth in front of the court house, "looking up at the jail," there were reasonable grounds to suppose that the individual was Williams' associate. His conduct—*i.e.*, waiting in front of the court house, and looking up toward the jail—was entirely consistent with what might have been expected of Williams' confederate. Although this information alone would obviously have been inadequate for an arrest, it was certainly sufficient to warrant further inquiry.

When the officer followed Meier he observed him walk approximately two blocks and then retrace his steps to the location of the parked 1961 Cadillac. The car had Nebraska license plates (Tr. 92), and since Williams was from out of state, this was consistent with the suspicion that it was the automobile in which he had come to town. When Meier was asked to whom the car belonged, he replied that it was owned by one Hamilton

"with whom I came to Laramie with" (Tr. 31). He produced four unmarked keys to the car—certainly not the usual equipment for a passenger. Considering the totality of the circumstances, the officer could reasonably conclude at this point that in light of (1) Meier's conduct in front of the court house, (2) his circuitous route to the automobile, and (3) the suspicious circumstances surrounding his custody of the Cadillac, he was implicated with Williams in the commission of a felony involving auto theft. Because of the ingenious method used by those engaged in this activity (pp. 10–11, *supra*), there was no quick method available to determine whether the automobile to which Meier had keys was stolen or not.

The fact that the sheriff said he was arresting petitioners for "investigation of auto theft" or "investigation of this Cadillac" did not invalidate the arrest. Plainly, this was a layman's way of saying that he was arresting petitioners for participation in auto theft. In this respect the case should be controlled by the reasoning in *Bell* v. *United States*, 254 F. 2d 82, 86 (C.A.D.C.), certiorari denied, 358 U.S. 885, where an officer testified that he had made an arrest for "[i]nvestigation of housebreaking." The court of appeals there held that the basic question was one of probable cause and "* * * not what name the officer attached to his action * * *." See also *Payne* v. *United States*, 294 F. 2d 723, 725 (C.A.D.C.), certiorari denied, 368 U.S. 883, where it was said that an officer arresting on probable cause need not be thinking in the technical terms of conspiracy.

Nor should the fact that the other charges, which were ultimately dismissed, were filed against petitioners affect the validity of their arrests for auto theft. By Monday, May 14, undersheriff Lankford certainly had sufficient probable cause to arrest Meier for theft of the 1961 Cadillac since Hamilton, the purported owner of the automobile "with whom [Meier] came to Laramie" (Tr. 31), had not appeared at police headquarters to claim his automobile or to report his traveling companion as missing. Hence the additional charges are attributable to the officer's mistaken notion that it would be easier to keep petitioners in custody while ownership of the automobiles was being traced if they were charged with other local offenses (Tr. 100). This error should not affect the admissibility of evidence against petitioners which was otherwise obtained by a lawful arrest and search.

4. The search of the 1961 Cadillac by Lankford was incident to Meier's lawful arrest. It could be searched because, by the very nature of the offense with which Meier was charged, it was necessary to discover who the rightful owner of the automobile actually was. In addition, the automobile was actually "fruit of [the] crime" within the meaning of *Harris* v. *United States*, 331 U.S. 145, 154, so that it could be searched and seized incident to a lawful arrest for auto theft. Finally, the seizure was justified apart from any supporting arrest under Section 31-322 of Wyoming Statutes Annotated (1959), which provides:

> All officers are hereby empowered, authorized and directed to take and hold possession of any automobile * * * which such officer may have

good and sufficient reason to believe is not in the rightful possession of the driver or person in charge thereof for such reasonable time as may be necessary; * * *

5. The search by Gustafson on May 14, 1962, was made after it had been established by petitioner Williams' own admission that he had come to Laramie with Meier (then still known as Richmond) in the 1961 Cadillac. Knowing, as he did, that Williams had first been apprehended after attempting to obtain a Wyoming registration for an automobile which was still in the possession of a Chicago resident, Gustafson had substantial reason to believe that the scheme described at pp. 10–11, *supra*, was being attempted by Williams and anyone involved with him. This information, together with Hamilton's failure to appear and reclaim his automobile, justified the State authorities in retaining custody of the 1961 Cadillac under the above Wyoming statute until its ownership had been established. And having discovered the discrepancy between the concealed and open serial numbers, the law-enforcement officials were also justified in retaining custody of the automobile and searching it further. Hence both the search made by undersheriff Lankford on May 11 and that made by F.B.I. agent Gustafson on May 14 were valid, and the evidence produced by those searches was properly admitted against petitioners.

6. If the entire course of conduct is viewed in light of the types of crime involved and the alternatives available to law-enforcement officials, the fair conclusion is that the officers' conduct here was that "of

reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar* v. *United States*, 338 U.S. 160, 176. Having substantial grounds to believe that petitioners were engaged together in an ingenious scheme to steal automobiles with minimal risk, they had no alternative other than to keep them in custody until the true ownership of the 1961 Cadillac was established.

7. Petitioners' complaints as to various trial rulings all relate to isolated incidents of no real significance. As this Court has said: "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser* v. *United States*, 315 U.S. 60, 83.

a. At four points during the testimony of agent Gustafson, defense counsel objected on the ground that the witness was not qualified, and on each occasion that court told counsel that, if he desired, he might inquire further as to the witness' qualifications (Tr. 162, 166, 180, 185). Read in context the court's remarks were in no way intended to shift the responsibility of qualification from the government to the defense. Rather the court was ruling that, as a preliminary matter, the witness was qualified, and that any attempt to impeach his qualifications would have to come from the defense.

b. The attack on the testimony of Rickards with respect to the records of the Auto Theft Bureau is fully discussed in the opinion of the court of appeals (Pet. App. A9). As the court pointed out, if there was any hearsay, it went only to matters which were either not disputed or were established by other com-

petent evidence. The crucial fact as to ownership of the car driven by petitioners was established by the testimony of the owner.

c. There was no error in the cross-examination of petitioner Meier. The trial judge exercised his discretion by allowing a preliminary question as to whether Meier had lived with a certain woman (Tr. 341). At this stage it appeared that some relevant form of impeachment might be developed as to the relationship between Meier, the woman, and this case. When the government sought to show only that she was a narcotics addict, the court terminated the questioning before any answer was given.

Further in the cross-examination, Meier admitted that he had handled some of the road maps found in the car (Tr. 345)—maps which had been tested for fingerprints (Tr. 202). When he could not remember handling a particular map, the prosecutor asked whether he would remember handling it if told that his thumbprint was on it (Tr. 346). There is no basis for any inference that the government was trying to hint at nonexistent evidence, or otherwise asked the question in bad faith. At most, the prosecutor was seeking to expand upon and clarify Meier's admission as to having handled some of the maps.

d. Petitioners' attack on the prosecutor's summation, on two grounds not raised at the trial, is without merit. The statements complained of were well within the range of permissible comment. In any event the judge instructed the jury that the argument of counsel was not evidence and should not be so considered (Tr. 376–377).

c. At trial, petitioners objected to the court's instructions on "intent" as "not being the law applicable" (Tr. 383–384), a contention which is renewed here. The court instructed that intent might be inferred from (Tr. 381)

> * * * the character of the act, the circumstances surrounding it and from the conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all this, unless the evidence satisfies you of something different, you are instructed that a person is responsible for the natural probable legitimate consequences of his own acts."

While questions have been raised as to the propriety of the "natural and probable" instruction in cases involving specific intent (see *e.g., Sherwin* v. *United States*, No. 519, this Term, certiorari denied, January 6, 1964) such an issue has nothing to do with this case, where the offense turns not upon "intent" but upon knowledge. The crucial question is whether petitioners knew that the car which they admitted driving from Seattle to Wyoming was stolen. The court twice instructed correctly on the matter of knowledge (Tr. 378–379, 382–383), and no question has been raised as to those instructions.

Petitioners' remaining arguments regarding the instructions were never raised at the trial level and should not now be heard. See Rule 30, Federal Rules of Criminal Procedure.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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